

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 178 of 1991

with

CRIMINAL APPEAL No 256 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NINAMA RUPAJI KALAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 178 of 1991
MR KG SHETH Adv (Appointed) for Appellant
Mr.KP RAVAL, APP
2. Criminal AppealNo 256 of 1991
Mr.KP RAVAL, APP
MR KG SHETH Adv (Appointed) for Respondent.

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 19/02/98

ORAL JUDGEMENT (Per S.M.Soni, J)

Deceased Thavaraji had 3 real brothers. One of which is accused no.1, accused no.3 is the wife of accused no.2. and accused no.2 is the son of accused no.1 and accused no.4 is the wife of Ratnaji, other brother of the deceased. They had some dispute about partition of their agricultural land. They were cultivating some forest land in the Bhagaldara forest since 20 years. The land admeasures 7 acres. Partition of that land took place some 5 years before. Deceased got sanctioned some other land and was cultivating after developing the same. For developing the same he had incurred certain expenditure. Towards the expenditure other brothers have not contributed anything. Other brothers were demanding partition of that land which deceased was not denying, however, was insisting for their proportionate contribution to the expenses incurred by him.

2. On 8.6.90 at about 9:00 pm, deceased was in his house with his wife and 3 daughters. The sons of the deceased had gone to attend some marriage at Virpur. It was full moon day. At that time accused no.1 and 2 armed with axe and stick respectively came to the house of the deceased hurled filthy abuses and quarrelled with the deceased demanding partition of the excess land. Deceased told them that he is prepared to partition the same provided they contribute their part of expenses. At that time accused no.2 gave a stick push on the belly portion of Lalitaben, daughter of deceased. She had persuaded accused not to quarrel with her father and she snatched away the axe and stick from the accused and accused went home. After an hour i.e. about 10:00 pm, accused no.1 shot arrows from near Vagha on the house of the deceased. Accused no.1 was in company of accused no.2,3 and 4 at that time. When accused no.1 was shooting arrows, accused no.4 supplied arrows to accused no.1, accused no.3 was speaking abuses and instigating the deceased Thavaraji. Then all the accused rushed to the house of the deceased. At that time accused no.1 had bow and arrow, accused no.2 had axe, accused no.3 had just accompanied them and accused no.4 had arrows. Reaching near the gate (jhapli) of the house of deceased, when Gauriben, wife of deceased tried to pacify them accused no.2 inflicted axe blow on the right hand of Gauriben. The blow was given from the edge side of the axe. When deceased Thavaraji tried to intervene and save Gauriben, accused no.2 shot from behind arrow which

injured Thavaraji on the left side of his chest from the back side. He fell down and was bleeding. He asked his daughter Kailash to draw out the said arrow so that he may survive. On drawing out the arrow, he bled profusely and died. A telephonic intimation was sent to Bhiloda Police Station from where Police Sub Inspector reached the scene of the offence. Lilawati PW2 complained, basis on which the offence was registered. Necessary investigation was carried out and all the 4 accused were charge-sheeted in the court of Chief Judicial Magistrate First Class, Himatnagar, who in his turn committed the case to the court of Sessions for trial.

3. Learned Additional Sessions Judge framed charges against the accused to which the accused pleaded not guilty and claimed to be right. On completion of the evidence laid for prosecution further statement of accused was recorded. After hearing the learned Advocates, learned Additional Sessions Judge held accused no.1 guilty of offence punishable under Section 302 of Indian Penal Code and awarded life imprisonment. He held accused no.2 guilty of offence under section 324 and 323 of the Indian Penal Code and awarded rigorous imprisonment of 8 months and 3 months respectively. Accused no.2 was acquitted of charge under section 302. Accused no.3 and 4 were acquitted on all the charges levelled against them.

4. Accused no.1 has preferred Criminal Appeal No.178/91 against the judgement and order of his conviction under section 302. State has preferred Criminal Appeal No.256/91 against the order of acquittal under section 302 of accused no.2. It appears that the State has accepted the order of acquittal of accused no.3 and 4.

5. Learned Advocate Mr.KG Sheth appearing for the appellant accused (accused no.1 in short) has contended before this court that learned Additional Sessions Judge has erred in holding the appellant guilty of offence punishable under Section 302. Mr.Sheth contended that evidence of the witness as relied on by the learned Additional Sessions Judge could not be relied upon in absence of any independent witness to corroborate their evidence. All the witnesses are the members of the family of the deceased and they are interested in securing conviction. Absence of corroboration by independent witness makes their evidence unreliable one. Mr.Sheth further contended that accused no.3 was also injured at the relevant time and the prosecution witnesses have not explained the injuries on the person

of the accused. This is to suggest that they are suppressing the true facts and true genesis of the incident is not brought on record. So far as the acquittal appeal is concerned Mr.Sheth contended that learned Additional Sessions Judge has rightly held that in the facts of the case charge under section 34 against accused no.2 could not be sustained. Mr.Sheth contended that no doubt accused no.2 accompanied accused no.1 but initially they had gone there to demand the partition of the land and the weapons in the hands of the accuses who are tribals are normally in their hands, more particularly because they were moving at night time. Mr.Sheth therefore contended that the order of acquittal does not call for any interference. Mr.KP Raval, Learned Advocate appearing for the State in both appeals contends that there is cogent, convincing and sufficient evidence whereby the guilt of accused no.1 is established. Incident took place at the house of the deceased and there cannot be and need not be any independent person to witness the incident. More particularly, the incident took place at 10:00 pm. Mr.Raval further contended that it is accused no.2 who started the assault on Gauriben and Fhulva and when deceased tried to pacify them he was shot arrow from behind by accused no.1. If accused no.2 had no common intention as with his father accused no.1 there was no reason on his part to assault first the ladies, who tried to intervene and pacify them. Mr.Raval contended that on their own admission by accused no.1 and 2 their injuries were not caused at the time of incident and they were caused much before the incident. This fact is admitted by the accused in their further statement. The injuries on the person of the accused are not related with the incident and therefore prosecution is not required to explain the same. Mr.Raval contended that there was no reason for accused persons firstly to go to the house of deceased at night time and secondly, with weapons particularly when they had gone there to ask for partition of the land wherein they claim share. These facts of going at night time with weapons and first assaulting the ladies discloses their intention and therefore, the learned Additional Sessions Judge has erred in not holding appellant accused no.2. guilty of offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Mr.Raval, therefore, contended that the appeal of the accused should be dismissed and that of the State should be allowed.

6. It is not disputed by either party that the deceased died a homicidal death. Deceased had the following external injuries:

1. A penetrating wound spindle shaped, oblique.

Entry : 3 "cms long, maximum wide 0.4 cms on slight left side of Vertebral Column at 9th intercostal space at Thoracic region. Bleeding from wound.

Exit : Oblique, size 2.5 cms x 0.6 maximum wide above 4th intercostal space, left side above 2 cms from left nipple.

7. Deceased had following internal injuries which accordingly to the doctor are corresponding to external injuries. They are as under:-

1. Inter-costal Muscles, pierced. Blood Clot present. Left 4th rib is cut.

2. Pierced from posterior to interior. Blood Clot present. Thorasic cavity is filled with blood.

Dr.Bhikhabhai PW1 in his evidence has stated that these injuries have caused instantaneous death of the person. He has denied suggestion in the cross-examination that if a person who is injured with an arrow is treated immediately after drawing out the arrow can be saved. Thus, we may say that the injuries on the person of the accused was sufficient in the ordinary course of nature to cause his death. The deceased had died a homicidal death.

8. The question is whether the said injury is caused by accused no.1 and if so, is he guilty of the offence and what?

PW2, Lalitaben has deposed....

"On the day of the incident Fhulva, Kailash, my mother Gauri and myself were present in the house. My brother's wife Niruben had also come. My brothers have gone at Virpur to attend marriage. It was full moon day on the date of the incident. My father had returned at night at about 9:00 pm from outside. Accused no.1 and 2 then had come to my house. They were uttering abuses. Chandu had a stick in his hand. Rupaji, accused no.2 had a axe. They were uttering abuses and speaking as to why land is not partitioned. My father told them to pay the money spent and I will partition the land. At that time, accused no.2 gave a stick push on my belly. I persuaded them not to beat my father. We will do the needful in the morning. I snatched away the stick and axe from them and they had gone away..... After some time at about 10:00 pm, accused no.1 shot arrows from Vaga towards our

house. He shot about 10 arrows. Some of them had fallen in our house and some fell outside. Accused no.4 was supplying arrows to accused no.1 and she was also uttering abuses. She was also speaking "kill them". In the meantime, Rupaji, Chandu, Shanta and Ramila came near the house. At that time, Chandu had a axe, Rupaji had bow and arrow and Ramila had arrows and Shanta was speaking "kill them". All the four entered our gate. I requested them not to assault my father. Accused Chandu gave a blow of blunt portion of axe on the right hand of my mother. She, therefore fell down. When my father Thavaraji intervened, accused Rupaji bent down and shot arrow to my father from behind. That arrow went thorough from the left side. My father told my sister Kailash to draw out that arrow so that he may survive. Kailash drew out the arrow. My father then fell down and was bleeding profusely. He became unconscious and he died within a short time. Accused Rupaji had given blow from the blunt side of axe on the head and right leg of Phulva. We thereafter shouted and one Thavaraji Kabaji had come. Accused therefore threw away the weapons and ran away."

In the cross-examination, all the allegations in the examination-in-chief are disputed and challenged. She has stated that it was dark at the time of the incident. She has stated that they had a kerosene lamp. She had denied that she has not seen accused shooting arrows. She has denied that some unknown persons had killed her father and have thrown away the dead body in their house. She has denied that she was at her in-laws house on the date of the incident and she has not seen the incident. In our opinion, the defendant has not been able to take out or bring out anything which makes the evidence of PW2 suspicious or unreliable. PW2 is the daughter of deceased who was in the house at the relevant time. PW2 was injured by the push of the stick when accused no.1 and 2 had come first time by about 9:00 pm. That injury on the person of PW2 is proved by the evidence of PW1 vide Certificate Exh.18. Exh.18 shows blunt injury on right side of abdomen of Lalitaben and the said injury according to the doctor, can be caused due to hard and blunt substance. Lalitaben was examined by the doctor at about noon time on 9.6.90. Thus PW2 is corroborated by the medical evidence Exh.18.

9. At the time of the incident Gauriben, PW3 was also present. She has deposed in addition to what Lalita PW2 has said that I was inflicted by sharp edge of axe on my right hand. Nothing has been suggested in the cross-examination to make her evidence either suspicious or unreliable. Her evidence is corroborated by medical

evidence whereby her injuries are proved for which Certificate Exh.17 is issued. PW1 has examined Gauriben at 12:00 noon on 12.6.90. It is stated by the doctor that inside wound on the lower third of right fore arm can be caused by sharp cutting instrument like axe.

10. Then, there is evidence of Fhulva PW4, who has corroborated the evidence of PW2 Lalitaben as well as PW3 Gauriben. She is also an injured witness. She has stated in the cross-examination that the night being full moon arrows were seen. She has denied that some unknown persons had killed my father and threw in our house. Her injuries are proved through evidence of Doctor PW1 and vide medical certificate Exh.16.

11. Evidence of PW2, PW3 and PW4 is further corroborative by the evidence of Kailashben. She has drawn out the arrow from the chest of her father. Nothing has been found out or shown in her cross-examination to make her evidence unreliable.

12. After the incident Thavarji Kanji PW6 had come and he has seen accused no.2 & 3 run away. He has seen deceased Thavarji lying in bleeding condition and injured by arrow from the back side. From the evidence of these 4 witness of which 3 are injured and when the incident has taken at the house of the deceased where witnesses are presumed to be present, we do not find any reason to disbelieve their say. We therefore, agree with the conclusion arrived at by the learned Additional Sessions Judge that it is accused no.1 who shot the arrow injuring deceased from the back on left side and was witness by PW2, PW3, PW4 and PW5.

13. From the above discussions, it is clear that accused have come to the house of the deceased and that is further corroborated by Panchnama Exh.29 duly proved through the evidence exhibited on admission by the defence side. Thus we do not find any reason to interfere with the conclusion arrived at by the learned Additional Sessions Judge against accused no.1.

14. We have held above that accused have not gone with common intention to kill. Therefore, the question may arise as to in which clause of the Indian Penal Code act of accused no.1 will fall. In our opinion act of accused no.1 will fall in clause 3 of Section 300 of Indian Penal Code and in light of the observations made in the case of Virsasing reported in AIR 1958 SC 465, the act of the accused no.1 falls squarely within the perview of clause 3 of Section 300. Accused no.1 and 2 in their

further statements have explained their own injuries which are certified vide Exh.20 & 21 saying that the same is caused by slip from a cart and fall from a tree. Therefore the injuries on the person of accused no.1 & 2 loses significance and does not affect the prosecution.

15. So far as the appeal against accused no.2 is concerned except injuries by the accused on the person of PW2, PW3 & PW4, nothing further is alleged by the Prosecution witness. It appears that the accused went to the house of deceased to demand their share in land. They wanted to get their land partitioned. Accused no.2 has not made a gesture to assault the deceased which in our opinion he could have easily done when he intervened while he assaulted PW3. Section 34 of the Penal Code reads as under:-

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him on his own."

Common intention at the time when accused reached the house of deceased was to see that they get their share in the land. Common intention does not appear to kill the deceased. They had gone there with arms but not with an intention to kill the deceased. Therefore, Additional Sessions Judge has rightly acquitted accused no.2 of offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

16. In the result, both the appeals fail and are dismissed.

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